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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 585

N. SIMS ORGAN & CO., INC. and N. SIMS ORGAN,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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This petition for certiorari was filed on December 4, 1961. On December 7, 1961, the United States Court of Appeals for the Second Circuit decided two cases, *Berko* v. *S. E. C.*, and *Kahn* v. *S. E. C.* (both as yet unreported in the Federal Reporter), CCH Federal Securities Law Reporter, ¶91,115 and ¶91,116.

In our opinion, the decisions in these cases are in direct conflict with the decision in the case at bar. We refer particularly to the facts as stated at App. pp. A-3-4 and App. pp. B-5-6. These cognate cases were reversals on behalf of two securities salesmen who had been held "causes" in a revocation proceeding against a broker-dealer, MacRobbins & Co., Inc.

Just as in the case at bar, the gravamen of the offenses charged consisted of a single telephone call from the salesman to a customer, in which it was stated that a stock will go up. Judge Marshall said in *Berko*:

> "The SEC's findings boil down to the following propositions. Berko predicted Sports would rise to 15 within a year. There was no adequate basis for this statement because Sports, a firm in business for approximately one year, was suffering initial operating losses. Petitioner should have known of the losses and disclosed them."
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> * * * *
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> "The present case however involves the liability of an employee of the firm who exercised no control over its operations and apparently did not engage in a continuous course of fraudulent conduct. Moreover, the findings and apparent legal theory of the Commission itself are not restricted to 'boiler room' operations. The only finding is that Berko made the prediction. The only legal theory is that this statement should have been accompanied by disclosure of the losses and that it lacked an adequate basis. In neither aspect do we find an element peculiar to so-called 'boiler room' operations."

In our opinion, the Court of Appeals for the Second Circuit has overruled its decision in the case at bar. We examined the original briefs on file in the office of the Second Circuit Clerk, and we find that not only was the opinion in the case at bar cited, but it was discussed.

Of course, the inevitable result of an appellate court sitting in groups of three judges is a possibility

of conflicting opinions which cannot be completely resolved by a provision for re-hearing by the sitting judges *en banc*. Yet in the case at bar, one member, Judge Friendly, sat in all three cases—*Berko*, *Kahn*, and *Organ*. Thus, we can only infer that the Second Circuit has overruled itself.

Any petition for re-hearing below is barred by lapse of time, because of the fifteen day limitation in the rules of that court. Nevertheless, when the ultimate result of the affirmance of the SEC's opinion is the barring of the petitioner Organ for life[1] from the only business he ever knew, as a result of a doubtful telephone conversation with a hard-of-hearing, disgruntled customer, this Court should exercise its discretionary jurisdiction and grant certiorari. The Hearing Examiner found that there was no proof of any misrepresentation by Organ (R. 26a-27a).

Answering Respondent's Brief

Attention is directed to page 3 of respondent's brief wherein it is stated: "These activities resulted in revocation of that Company's registration on December 28, 1958 (Pet. App. B-3). See *J. H. Lederer Co.*, 38 S.E.C. 794. Within a month after the revocation, petitioner N. Sims Organ Co. * * * was organized, and application was made thereafter for its registration as a broker and dealer. (Pet. App. B-4)."

A studied attempt upon the SEC's part has been made to create the impression that there was a nefarious plan between Lederer & Co. and Organ to create

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[1] The arguments of the petitioners in *Berko* and *Kahn* were to the same effect, and apparently moved the Second Circuit to reverse.

N. Sims Organ & Co., Inc., after Lederer & Co.'s registration was revoked.

The SEC well knows, as a matter of record, that N. Sims Organ & Co., Inc., was originally incorporated on January 8, 1959, as R. H. Palmer & Co., Inc., by individuals not connected with Organ and who never had any relationship whatsoever with either Lederer or Organ; that when the original incorporating parties decided to abandon the corporate shell, Organ, to save expenses, undertook in September 1959 to take over that shell and to change its name to N. Sims Organ & Co., Inc. At no time since its incorporation as R. H. Palmer & Co., Inc., and prior to the change of name to N. Sims Organ & Co., Inc., had Palmer & Co., Inc., engaged in any business or consummated any transaction.

N. Sims Organ & Co., Inc., was thus actually organized on September 28, 1959, almost one year after the Lederer revocation.

This calculated and brazen attempt by an arm of the government to buttress its weak case by knowingly attempting to create a wrongful inference, diffusing an aura of wrongdoing where none ever existed, merits severe censure.

Attention is called to another inconsistent position adopted by the SEC.

It urges that the initial hearing before the Examiner was one to determine whether the effective date of the broker-dealer Registration should be further postponed pending the denial proceedings (R. 18a).

The actual fact is that the effective date of registration by SEC order, had been extended to December 21, 1959. The hearing on the denial proceeding then commenced, the SEC presenting its witness and evidence.

To substantiate petitioners' contention that the proceeding before the Hearing Examiner was a denial proceeding, reference is made to the Release publicly distributed by the SEC (Commission Brief, pg. 11):

"Fraud charged to N. Sims Organ Co."

"The S.E.C. has issued an order under the Securities Exchange Act postponing the effective date of N. Sims Organ & Co., Inc., 460 E. Park St., Long Branch, L.I., New York, as a broker-dealer *and ordering a hearing on the question whether such registration should be denied* * * *" (emphasis added)

This notice was dated November 23, 1959. The hearing commenced December 2, 1959.

Attention is called to the anomalous fact that N. Sims Organ & Co., Inc., had never actively engaged in any business, yet it had been charged with fraud.

Since the order of the SEC, Mr. Organ has been unable to obtain employment in the only profession in which he is qualified. Mr. Organ's source of income has been lost; he is no longer the support of his family; and he has been the object of charity being unable to pay counsel and other expenses in this proceeding.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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